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No. 92-8894

In The

Supreme Court of the United States

October Term, 1993

CLARENCE VICTOR,

Petitioner,

vs.

NEBRASKA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Nebraska

JOINT APPENDIX

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IN THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

THE STATE OF NEBRASKA, Plaintiff, - vs - CLARENCE VICTOR, Defendant.	)	Docket 122 No. 046 INSTRUCTIONS TO THE JURY

LADIES and GENTLEMEN OF THE JURY:

You are now instructed by the Court in this case as follows:

INSTRUCTION NO. 1

It now becomes my duty to instruct you in the law. All questions of fact are to be decided by you, the jury, and to these facts you will apply the law given to you in all these instructions, even though you believe that the law should be otherwise.

No attempt has been made to embody all the law applicable to this case in any one instruction. Therefore, any one instruction should be considered in the light of all the others.

In determining any questions of fact presented in this case, you should be governed solely by the evidence introduced before you. You should not indulge in speculation, conjectures, or inferences not supported by the evidence. You should not consider any evidence which has been stricken from the record; you should not be

influenced by statements of counsel not supported by evidence. Each of you may apply to the subject before you that general knowledge which anyone of you may be presumed to have, yet, if any of you be personally acquainted with any material or particular fact not supported by the evidence, you should not consider your personal knowledge of such fact or mention it to your fellow jurors.

INSTRUCTION NO. 1 (Page 2)

You must not construe any statements, actions, or rulings of the court in the trial of this case, nor any of the inflections of the voice in the reading of these instructions, as reflecting an opinion of the court as to how this case should be decided.

You will allow no sympathy or prejudice for or against either party to influence you in arriving at your verdict. The law demands of you a just verdict uninfluenced by sympathy or prejudice or any considerations outside the evidence and the law as given you in these instructions.

On the other hand, you find that the State has failed to prove beyond a reasonable doubt any one or more of the material elements in this Section I, it is your duty to find the defendant not guilty of the crime of murder in the first degree. You shall then proceed to consider the lesser included offense of murder in the second degree, set out in Section II below.

SECTION II

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of murder in the second degree are:

1. That defendant Clarence Victor on or about December 26, 1987, did kill Alice Singleton;

2. That he did so in Douglas Couinty [sic], Nebraska; and

3. That the defendant did so intentionally, but without premeditation.

If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements in this Section II is true, it is your duty to find the defendant guilty of the crime of murder in the second degree and you shall not then consider the lesser included offense hereinafter set forth in Section III of this instruction.

On the other hand, you find that the State has failed to prove beyond a reasonable doubt any one or more of the material elements, it is your duty to find the defendant not guilty of the crime of murder in the second degree. You shall then proceed to consider the lesser included offense of manslaughter set out in Section III below.

SECTION III

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of manslaughter are:

1. That defendant Clarence Victor on or about December 26, 1987, did kill Alice Singleton.

2. That he did so in Douglas County, Nebraska;

3. That the defendant killed Alice Singleton without malice, either upon a sudden quarrel or unintentionally while the defendant was in the commission of an unlawful act, such as an assault upon Alice Singleton.

If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements has been proved beyond a reasonable doubt, it is your duty to find the defendant guilty of the crime of manslaughter. On the other hand, if you find the State has failed to prove beyond a reasonable doubt any one or more of the foregoing material elements, it is your duty to find the defendant not guilty of manslaughter and not guilty of any charge in this case.

INSTRUCTION NO. 2

This is a criminal action prosecuted by the State of Nebraska against the defendant upon an Information filed by the County Attorney of Douglas County, Nebraska, pursuant to law.

In the Information in Count I, it is charged in substance that:

On or about the 26th day of December, 1987, in Douglas County, Nebraska, the defendant, Clarence Victor, did then and there purposely and with deliberate and premeditated malice kill Alice Singleton.

In the Information in Count II, it is charged in substance that:

On or about the 26th day of December, 1987, in Douglas County, Nebraska, the defendant, Clarence Victor, did then and there use a knife or a deadly weapon to commit a felony, which may be prosecuted in a court of this state, both Counts I and II contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State of Nebraska.

To these charges the defendant has entered a plea of not guilty. The charges and the defendant's plea make up the issues which you will determine by your verdict.

INSTRUCTION NO. 3

The Information, or the fact that the County Attorney has filed the Information, is not to be considered by you as evidence. The Information simply contains the charges upon which the defendant is to be tried.

INSTRUCTION NO. 4

Under Count I of the Information in this case, depending on the evidence, you may find the defendant:

(1) Guilty of murder in the first degree in that defendant Clarence Victor killed Alice Singleton purposely and with deliberate and premeditated malice; or

(2) Guilty of murder in the second degree; or

(3) Guilty of manslaughter; or

(4) Not guilty.

SECTION I

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of first-degree murder are:

1. That defendant Clarence Victor, on or about December 26, 1987, did kill Alice Singleton.

2. That the defendant did so in Douglas County, Nebraska; and

3. That the defendant killed Alice Singleton purposely and with deliberate and premeditated malice.

If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements is true, it is your duty to find the defendant guilty of the crime of murder in the first degree and you must not then consider the other lesser included offenses hereinafter set forth in sections II and III of this instruction.

INSTRUCTION NO. 5

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of use of a knife or a deadly weapon to commit a felony in Count II are:

1. That on or about the 26th day of December 1987, in Douglas County, Nebraska, the defendant Clarence Victor did commit murder in the first degree, murder in the second degree, or manslaughter, which is the subject of Count I of this Information.

2. That in the commission of said murder in the first degree, murder in the second degree, or manslaughter, a knife or a deadly weapon was used;

3. That such use of a knife or deadly weapon to commit a felony was intentional.

The State has the burden of proving beyond a reasonable doubt each and every one of the foregoing material elements necessary for conviction.

If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements is true, it is your duty to find the defendant guilty of the use of a knife or a deadly weapon to commit a felony as charged in Count II. On the other hand, if you find the State has failed to prove beyond a reasonable doubt any one or more of the foregoing material elements, it is your duty to find the defendant not guilty of the use of a knife or deadly weapon to commit a felony as charged in Count II.

The burden is always on the State to prove beyond a reasonable doubt all of the material elements of the crime charged, and this burden never shifts.

INSTRUCTION NO. 6

The statutes of the State of Nebraska in full force and effect at the time alleged in the Information provided in substance as follows:

A person commits murder in the first degree if he kills another person purposely and with deliberate and premeditated malice. . . .

A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation.

A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act.

Any person who uses a . . . knife . . . or any other deadly weapon . . . to commit any felony which may be prosecuted in a court of this state . . . may be punished as provided by law.

Any person found guilty of the violation of such statues shall be punished as provided by law.

INSTRUCTION NO. 7

"Deliberate" is defined as not suddenly, not rashly; but requires that the defendant considered the probable consequences of his act before doing the act.

"Malice" is defined as that condition of the mind which is shown by intentionally doing a wrongful act without just cause or excuse. It means any willful or corrupt intention of mind.

"Premeditated" is defined as conceived or thought of beforehand; already meditated upon before doing the act.

"Purposely" is defined as meaning intentionally.

A "knife" shall mean any dagger, dirk, knife, or stiletto with a blade three and half inch in length, or any other dangerous instrument capable of inflicting cutting, stabbing or tearing wounds.

A "deadly weapon" shall mean any knife, or other device, instrument, material or substance, either animate or inanimate, which in the manner it is used or intended to be used is capable of producing death or serious bodily injury.

"Any felony" as used in the statute regarding the use of a knife or deadly weapon, includes murder in the first degree, murder in the second degree, or manslaughter.

"Assault" is injuring another person intentionally, knowingly, or recklessly or threatening another person in a menacing manner.

An assault in any degree is, under the Nebraska Criminal Code, an unlawful act within the meaning of the manslaughter statute.

INSTRUCTION NO. 8

While the law requires, in order to constitute murder in the first degree, that the killing shall be willful, deliberate and premeditated, still, it does not require that the willful intent, premeditation or deliberation, shall exist for any length of time before the crime is committed; it is sufficient if there was a design and determination to kill distinctly formed in the mind at any moment before the killing took place, even though such design and determination to kill was formed in the mind only immediately before the killing took place.

You are instructed, therefore, that if you believe from the evidence, beyond a reasonable doubt, that the defendant killed Alice Singleton, as charged in the Information; and that before he killed Alice Singleton the defendant

had formed in his mind a willful, deliberate and premeditated design or purpose to take the life of Alice Singleton, and that the act of killing her was in furtherance of that design or purpose and was without any justifiable cause or legal excuse therefor, then the defendant had the purpose and deliberate and premeditated malice required to be guilty of murder in the first degree.

INSTRUCTION NO. 9

"Reasonable doubt" is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused. At the same time, absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken. You may find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an actual and substantial doubt reasonably arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the State, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

INSTRUCTION NO. 10

Intent is a material element of the crime charged against the defendant. Intent is a mental process, and it therefore generally remains hidden within the mind where it is conceived. It is rarely – if ever – susceptible of proof by direct evidence. It may, however, be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his conduct. But before that intent can be inferred from such circumstantial evidence alone, it must be of such character as to exclude every reasonable conclusion except that the defendant had the required intent. It is for you to determine from all the facts and circumstances in evidence whether or not the defendant committed the acts complained of and whether at such time he had the criminal intent. If you have any reasonable doubt with respect to either, you must find the defendant not guilty.

INSTRUCTION NO. 11

Evidence is either direct or circumstantial.

Evidence is direct when a witness testifies from his own personal knowledge concerning a material element of the crime charged. Evidence is circumstantial when it relates to the existence or nonexistence of facts from which a material element of the crime charged may be inferred and when that inference usually and reasonably follows according to the common experience of mankind.

A material element of a crime may be established by circumstantial evidence alone so long as such evidence taken as a whole establishes such element beyond a reasonable doubt.

INSTRUCTION NO. 12

The state has introduced in evidence certain statements claimed to have been made by the defendant.

Before such statements may be considered by you as evidence of defendant's guilt, you must find beyond a reasonable doubt that they were freely, voluntarily, and intelligently made by the defendant.

Before you may find that they were "freely and voluntarily" made, you must find:

a. That they were not procured or induced by promises directly or indirectly made by persons in authority, or by other persons that such statements would result in benefit or advantage to defendant; and

b. That they were not obtained as a result of force, fear oppression, or coercion.

To be voluntary, a statement does not have to proceed wholly or spontaneously at the suggestion of the defendant. The fact that it may have been elicited by questions propounded by persons in authority or other persons who were interrogating the defendant will not, of itself, render it inadmissible.

Before you may find that they were "intelligently" made, you must find that they were made with knowledge and understanding of what was said, without mental confusion, and with mental appreciation of what was said.

INSTRUCTION NO. 12
(Cont'd)

Therefore, if you find beyond a reasonable doubt that the statements were made by the defendant and were made freely, voluntarily, and intelligently, you may consider them in your deliberations and give them such weight as you deem them entitled to. But if you do not so find, it is your duty to disregard them completely and you must not consider them for any purpose, whether or not you may happen to think they are true.

INSTRUCTION NO. 13

Certain witnesses have been called who testified as expert witnesses. You are not required to take the opinions of experts as binding upon you, but they are to be used to aid you in coming to a proper conclusion. Their testimony is received as that of persons who are learned by reason of special investigation, study or experience along lines not of general knowledge, and the conclusion of such persons may be of value. You may adopt, or not, their conclusions, according to your own best judgment, giving in each instance such weight as you think should be given under all the facts and circumstances of the case.

In determining the weight to be given such testimony you should consider, among other things:

1. The education, training, experience and knowledge of the expert with respect to the matters about which he testified.
2. The reasons given for his opinion.
3. The sources of his information.

INSTRUCTION NO. 14

You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony. In determining the weight which the testimony of the witnesses is entitled to receive, you should consider:

1. Their interest in the result of the suit, if any;
2. Their conduct and demeanor while testifying;
3. Their apparent fairness or bias or relationship to the parties, if any such appears;
4. Their opportunity for seeing or knowing the things about which they have testified;
5. Their ability to remember and relate accurately the occurrences referred to in their evidence;
6. The extent to which they are corroborated, if at all, by circumstances or the testimony of credible witnesses;
7. The reasonableness or unreasonableness of their statements;
8. Evidence of previous statements or conduct inconsistent with their testimony at this trial (if any such evidence has been adduced); and
9. All other evidence, facts, and circumstances proved tending to corroborate or contradict such witnesses.

INSTRUCTION NO. 15

You are to draw no conclusions or inferences from the fact that the defendant has not testified in this case, and you are entitled to draw no conclusions or inferences as to his reasons in that regard.

INSTRUCTION NO. 16

You have nothing whatever to do with the punishment of the defendant in the event of his conviction. Therefore, in determining his guilt or innocence, you have no right to take into into [sic] consideration what punishment he may or may not receive in the event of his conviction.

INSTRUCTION NO. 17

You will take these Instructions and the forms of verdict which have been prepared for your use, retire to your jury room, select your foreman, either man or woman, commence upon your deliberations, and, from the evidence before you and the law as given you in these Instructions, determine upon your verdict.

You should deliberate with open minds, give respectful consideration to the opinions of fellow jurors, freely exchange views or opinions concerning the case, and not be hesitant to change your minds when reason and logic so dictate.

During any time that you are not deliberating in the jury room, you shall not converse or communicate with any other juror or person on the subject of this trial, and you shall not listen to, read, or observe any account or

comment on that subject until you reconvene for deliberation.

If you do not agree upon a verdict by 5:00 o'clock P.M., you may separate and return for deliberation at 9:00 o'clock A.M. tomorrow, but in such event during such separation you are admonished not to converse or communicate with any other juror or person on the subject of this trial, and you shall not listen to, read, or observe any account or comment on that subject until you reconvene.

Your verdict must be unanimous and will be signed by your foreman only.

SEVEN forms of verdict are submitted herewith. You will complete only one form but return all forms.

Submitted at 12:24 o'clock P.M. on this 21st day of July, 1988.

BY THE COURT:

/s/ Illegible
District Judge

IN THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

(Caption Omitted In Printing)

DOC. 122 NO. 046

MOTION FOR NEW TRIAL

(Filed July 26, 1988)

COMES NOW the Defendant and respectfully moves the Court to grant him judgment of acquittal notwithstanding the verdict, or, in the alternative, to vacate and set aside the verdict of guilty rendered herein, and to grant the Defendant a new trial, for the following reasons, and each of them:

1. That there were irregularities in the proceedings of the Court, the prosecuting attorney, and the witnesses for the State prejudicial to the rights of the Defendant.

2. That there was misconduct on the part of the jury, the prosecuting attorney, and the witnesses for the State prejudicial to the rights of the Defendant.

3. That there were abuses of discretion by the trial court which prevented the Defendant from having a fair trial.

4. That the verdict was not supported by sufficient evidence.

5. That the verdict is contrary to law.

6. That errors of law on the part of the trial court prevented the Defendant from having a fair trial.

7. That the Court erred in giving the instructions herein and in giving each of said instructions.

8. That the Court erred in not sustaining Defendant's motion for directed verdict made at the close of the State's evidence and renewed at the end of all the evidence.

CLARENCE VICTOR, Defendant,

By /s/ Shannon P. O'Connor
Shannon P. O'Connor, #18004
Assistant Public Defender
Attorney for Defendant

(Certificate Of Service Omitted In Printing)

IN THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

(Caption Omitted In Printing)

DOC. 122 NO. 046

MOTION TO VACATE SENTENCE AND
CONVICTION UNDER NEB. REV. STAT. 29-3001

(Filed May 10, 1991)

COMES NOW the Defendant pursuant to the Nebraska Post Conviction Act. (*Neb. Rev. Stat.* 29-3001 *et. seq.*), the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Untied [sic] States Constitution, and Article I, Sections 3, 6, 7, 9, 10, 11, 12, 16, and 26 and Article II of the Nebraska Constitution and moves this Court for a hearing and thereafter, an Order vacating his conviction and setting aside his sentence of death in the above entitled case.

In support of this motion, the Defendant states as follows:

1. The Defendant was convicted by a jury of Murder in the First Degree and Use of a Weapon to Commit a Felony and was sentenced to death by electrocution on the homicide charge and a consecutive 20 years imprisonment for the weapons charge. Said sentence was imposed on November 21, 1988.

2. The Defendant's conviction and sentence was affirmed on direct appeal to the Nebraska Supreme Court. *State v. Victor,* 235 Neb. 770, ___ N.W.2d ___ (1990). Further, the Defendant's petition for Writ of Certiorari to the Nebraska Supreme Court was denied by the U.S. Supreme Court on February 25, 1991, *Victor v. Nebraska* No. 90-6259, 48 CrL. 3152.

3. That the Defendant has not previously filed a motion seeking relief under the Nebraska post conviction act, sec. 29-3001 et. seq.

4. The Defendant was denied due process of law in violation of the Fifth and Fourteenth Amendment of the U.S. Constitution and Art. I Sec. 3 of the Nebraska Constitution in that the trial court improperly instructed the jury on the law with regard to the concept of "Reasonable Doubt."

The trial court gave the following instruction:

> "Reasonable doubt" is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying thereon. It is such a doubt as will not permit you after full, fair and impatrial [sic] consideration of all the evidence, to have an abiding conviction. to a moral certainty, of the guilt of the accused. At the same time absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond reasonable doubt and yet be fully aware that possibly you may be mistaken. You may find and [sic] accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an actual and substantial doubt reasonably arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the state, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

This instruction is taken from NJI 14.08. The United States Supreme Court has recently held that a similar instruction violates due process of law. *See Cage v. Louisianna* 48 CrL 3062, ___ U.S. ___, ___ Spr. Ct. ___ (1990).

Since the primary defense asserted at trial by Defendant was that the state had insufficient evidence to prove the elements of premeditation and deliberation beyond a reasonable doubt, the Defendant was prejudiced by the courts instruction to the jury of this constitutionally infirm definition of reasonable doubt.

5. That the reweighing process of the aggravating and mitigating circumstances engaged in by the Nebraska Supreme Court violated the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution Art. I secs. 3, 9, and 13 of the Constitution of the State of Nebraska.

The Nebraska Supreme Court has said on numerous occasions that balancing of aggravating against mitigating circumstances is not merely a matter of number counting but rather requires a careful reweighing and examination of the various factors. *See State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989), *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977). In spite of this, the Nebraska Supreme Court, in reweighing aggravating circumstance Sec. 29-2523 (1)(a) refused to differentiate between the weight such aggravator should be given if the Defendant's prior convictions for Second Degree Murder and Manslaughter were both to be considered or if only his conviction for Second Degree Murder could be considered.

Obviously, if only one prior conviction could be used, aggravating circumstance (1)(a) would be present, but to

a substantially lesser degree than if both priors could be considered. Thus, the reweighing process used by the Nebraska Supreme Court is improper and prejudiced the Defendant in violation of *Clemmons v. Mississippi* 46 CrL. 2209 ___ U.S. ___, ___ Spr. Ct. ___ (1990).

6. That the death penalty imposed upon the Defendant was done in violation of the Eighth and Fourteenth Amendment [sic] of the Constitution of the United States and Art. I secs. 3 and 12 of the Nebraska Constitution in that the sentencing panel relied upon aggravating circumstance (1)(d) of Sec. 29-2523 *Neb. Rev. Stat.* (1943), which section is unconstitutionally vague and results in an arbitrary imposition of capital punishment.

7. That the sentencing panel and Nebraska Supreme Court refused to follow the U.S. Supreme Court's holding in *Lockett v. Ohio* 438 U.S. 586, 98 Spr. Ct. 2954 (1978) requiring consideration of all mitigating factors whether statutory or otherwise. Thus by deciding that aggravating circumstances Sec. 29-25 23 (2)(g) did not exist and totally refusing to consider the Defendant's inability to conform his conduct to law because of mental defect or intoxication the Defendant's rights under the Eighth and Fourteenth Amendment [sic] to the U.S. Constitution were violated.

8. That the death penalty imposed upon the Defendant was in violation of *Neb. Rev. Stat.* Sec. 29-2521.03 in that neither the sentencing panel nor the Supreme Court followed the requirement of comparing the facts of the Defendant's case with other "criminal homicides" with

the same or similar circumstances to determine the proportionality with the Defendant's sentence with the results of similar cases.

Such failure to conduct a significant proportionality review also constitutes a violation of the Eighth and Fourteenth Amendments of the Constitution of the United States.

9. That the sentencing panel erred by admitting into evidence at the sentencing hearing, the Defendant's confession to a 1964 homicide which resulted in a manslaughter conviction. Absent this confession there is no evidence to support considering that incident for purposes of Sec. 29-2523 (1)(a) *Neb. Rev. Stat.* The confession did not conform to the requirements of *Miranda v. Arizona*, 384 U.S. 436, 86 Spr. Ct. 1602 (1966) in that the evidence is uncontroverted that the police did not apprise the Defendant of his Fifth and Sixth Amendment rights under the U.S. Constitution. Therefore, the use of this statement to prove an aggravating circumstance was erroneous and a violation of the Fifth, Sixth, and Fourteenth of the U.S. Constitution and Art. I Secs. 3 and 12 of the Constitution of the State of Nebraska.

10. That the Defendant's confession was obtained in violation of the Fourth, Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution in that it was not voluntary, it was the product of an unlawful arrest and was obtained without a valid waiver of his so called Miranda rights.

11. That trial and appelate [sic] counsel was ineffective in failing to raise or improperly raising each of the

aforementioned issues in violation of Defendant's Sixth Amendment right to effective assistance of counsel.

WHEREFORE the Defendant moves that he be granted an evidentiary hearing and that, thereafter, his conviction and sentence be set aside and vacated.

CLARENCE VICTOR, Defendant.

by /s/ Clarence Victor
CLARENCE VICTOR,
Defendant
P.O. Box 2500
Lincoln, NE

(Verification Caption Omitted In Printing)

(Certificate Of Service Omitted In Printing)

IN THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

(Caption Omitted In Printing)

DOCKET 122 PAGE 046

ORDER

Defendant has filed a motion to vacate sentence and conviction pursuant to Section 29-3001, R.R.S. 1943, the Nebraska Post Conviction Act. Having reviewed defendant's motion and the files and records of this case, the Court finds that no evidentiary hearing is required and that defendant's motion should be overruled.

Defendant contends that his constitutional rights were violated in that the Court utilized the instruction on reasonable doubt that is provided in NJI 14.08, which has been extensively utilized and has been approved by the Nebraska Supreme Court. Defendant contends that in *Cage v. Louisiana,* 498 U.S. ___, 111 S. Ct. 328, 112 L.Ed. 2d 339 (1990), the Court held that such an instruction violates due process of law. The decision in *Cage* was rendered after defendant's conviction and affirmance of such conviction on appeal to the Nebraska Supreme Court. *Cage* does not indicate if its effect is retroactive. The Court determines that it should not be applied retroactively. *See Kernes v. Grammer,* 227 Neb. 165, 416 N.W. 26 253 (1987); *State v. Clark,* 217 Neb. 417, 350 N.W.2d 521 (1984); *Teague v. Lane,* 489 U.S. 288.

Defendant contends that the re-weighing process utilized by the Nebraska Supreme Court was improper and prejudicial to the defendant. The Court determines as a matter of law that the Nebraska Supreme Court did reweigh and examine the various factors that it found were established.

The Court finds that as a matter of law, the defendant's contention that Aggravating Circumstance 1-D of Section 29-2523, R.R.S. 1943, is unconstitutionally vague, is without merit.

Defendant's contention that the sentencing panel and the Nebraska Supreme Court failed to consider all mitigating factors, whether statutory or otherwise, is not supported by the record and by the opinion of the Nebraska Supreme Court.

Defendant's contention that neither the sentencing panel nor the Supreme Court followed the statutory requirement of comparison of defendant's case with other criminal homicides with the same or similar circumstances to determine their proportionality is not supported by the record or by the opinion of the Nebraska Supreme Court.

Defendant's contention that the sentencing panel erred by admitting into evidence at the sentencing hearing defendant's confession of a 1964 homicide resulting in a manslaughter conviction is without merit as a matter of law.

Defendant's contention that his confession was obtained in violation of his constitutional rights was raised by the defendant prior to trial, during trial, and on appeal to the Nebraska Supreme Court. His contention is without merit as a matter of law.

Defendant finally contends that trial and appellate counsel was ineffective in failing to raise or improperly raising each of the aforementioned contentions in violation of his Sixth Amendment right to effective assistance

of counsel. The Court determines as a matter of law that each of the aforementioned contentions either were raised on appeal to the Nebraska Supreme Court or the contention arose after his trial and final judgment by the Nebraska Supreme Court. Defendant's claim that his contentions were improperly raised on appeal constitutes a conclusion unsupported by any allegations of specific facts in that regard.

WHEREFORE, IT IS ORDERED, defendant's motion that he be granted an evidentiary hearing on the post conviction motion be and the same is hereby overruled.

IT IS FURTHER ORDERED that defendant's motion to vacate sentence and conviction be and the same is hereby overruled.

Dated this 17th day of September, 1991.

BY THE COURT:

/s/ Illegible
JUDGE

SUPREME COURT OF NEBRASKA

State of Nebraska, Appellee,
v.
Clarence Victor, Appellant.

Filed January 29, 1993. No. S-91-933.

Appeal from the District Court for Douglas County: James A. Buckley, Judge. Affirmed.

STATE V. VICTOR

NO. S-91-933 – filed January 29, 1993.

1. Postconviction: Appeal and Error. In an appeal from a denial of a motion for postconviction relief, the lower court's findings will be upheld unless clearly erroneous.

2. Postconviction. An evidentiary hearing on a motion for postconviction relief may properly be denied when the records and files of the case affirmatively establish that the defendant is not entitled to relief.

3. Postconviction: Appeal and Error. A motion for postconviction relief cannot be used as a substitute for an appeal or to secure a further review of issues already litigated on direct appeal. It is not the purpose of affording postconviction relief to permit the defendant endless appeals on matters already decided.

4. ___: ___. In the absence of a factual allegation, an initial demonstration of an extraordinary and relevant novel argument, or a reference to binding precedent not appearing in the record on direct appeal, errors of a state appellate court that are assigned for review before a state

trial court in a motion for postconviction relief are without merit.

5. Effectiveness of Counsel: Proof: Appeal and Error. A defendant who asserts a claim of ineffective assistance of counsel and who seeks reversal of his convictions must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.

6. Appeal and Error. Absent plain error, where an issue is raised for the first time in this court, it will be disregarded inasmuch as the court whose judgment is being reviewed cannot commit error regarding an issue never presented and submitted for disposition.

7. Effectiveness of Counsel: Appeal and Error. When a claim of ineffective assistance of counsel has not been raised or ruled on by the trial court *and* necessitates an evidentiary hearing, the matter will not be addressed on appeal.

8. Postconviction: Right to Counsel: Appeal and Error. Under Neb. Rev. Stat. § 29-3004 (Cum. Supp. 1992), a district court may appoint an attorney to represent a prisoner in all postconviction proceedings under Neb. Rev. Stat. §§ 29-3001 through 29-3004 (Reissue 1989 & Cum. Supp. 1992). This power is within the discretion of the district court, and failure to appoint counsel in postconviction proceedings is not error in the absence of an abuse of discretion.

9. Constitutional Law: Postconviction: Right to Counsel: Death Penalty. Neither the Eighth Amendment nor the Due Process Clause of the federal Constitution requires states to appoint counsel for indigent death row inmates seeking state postconviction relief.

10. Postconviction: Right to Counsel. Where the record shows that a justiciable issue of law or fact is presented to the court in a postconviction action, an indigent defendant is entitled to the appointment of counsel.

Hastings, C.J., Boslaugh, White, Caporale, Shanahan, Grant, and Fahrnbruch, JJ.

WHITE, J.

The defendant, Clarence Victor, appeals a decision of the district court for Douglas County to deny his pro se request for postconviction relief under Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1989 and Cum. Supp. 1992).

Victor was convicted of first degree murder and use of a weapon to commit a felony in the 1987 death of 82-year-old Alice Singleton. Victor was sentenced to death for the murder offense and given a consecutive sentence of 20 years for the felony weapon offense. The convictions were upheld on direct appeal. *State v. Victor,* 235 Neb. 770, 457 N.W.2d 431 (1990) (*Victor I*). The U.S. Supreme Court denied Victor's application for a writ of certiorari, *Victor v. Nebraska,* ___ U.S. ___, 111 S. Ct. 1091,

112 L. Ed. 2d 1195 (1991), and Victor sought state postconviction relief from the district court. Victor was represented at both the trial and the appellate level by the same attorney, but was denied court-appointed counsel on his motion for postconviction relief.

Defendant sought relief from the district court based on alleged violations of the 4th, 5th, 6th, 8th, and 14th Amendments to the U.S. Constitution and alleged violations of article I, §§ 3, 9, and 13, of the Nebraska Constitution. These claims summarily contended that (1) the trial court improperly instructed the jury on the law regarding the concept of "reasonable doubt"; (2) the reweighing process for aggravating and mitigating circumstances engaged in by the Nebraska Supreme Court was unconstitutional; (3) the death penalty was improperly imposed because the aggravating circumstance in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1989) is vague and results in an arbitrary imposition of capital punishment; (4) the sentencing panel and the Nebraska Supreme Court erroneously refused to consider defendant's inability to conform his conduct to law because of mental defect or intoxication as required by § 29-2523 (2)(g); (5) neither the sentencing panel nor the Nebraska Supreme Court compared the facts of defendant's case with other "criminal homicides" of same or similar circumstances to determine the proportionality of defendant's sentences with the results of similar cases; (6) at the sentencing hearing, the sentencing panel erroneously admitted defendant's confession to a 1964 homicide because the confession did not conform to *Miranda* requirements; (7) defendant's confession to the present homicide was not voluntary, was a product of an unlawful arrest, and was obtained without

a valid waiver of his *Miranda* rights; and (8) trial and appellate counsel was ineffective in failing to raise or in improperly raising each of the aforementioned issues.

On September 17, 1991, the district court denied defendant's motion for an evidentiary hearing and simultaneously entered an order overruling the motions for postconviction relief and vacation of sentences. After obtaining court-appointed counsel, defendant perfected this appeal. He now asserts that the district court erred in (1) refusing to grant an evidentiary hearing; (2) failing to appoint counsel to represent defendant for his motion to vacate sentences and convictions; (3) finding that defendant was not denied effective assistance of counsel; and (4) failing to retroactively apply *Cage v. Louisiana*, ___ U.S. ___, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), with regard to the reasonable doubt jury instruction. On this appeal, defendant also argues, for the first time, the failure of previous counsel to disclose a conflict of interest in representing defendant and in failing to submit evidence in support of the pretrial motion for change of venue.

In an appeal from a denial of a motion for postconviction relief, the lower court's findings will be upheld unless clearly erroneous. *State v. Sanders*, 241 Neb. 687, 490 N.W.2d 211 (1992).

Victor first argues that he was entitled to an evidentiary hearing under § 29-3001 on the additional allegations raised in his motion to vacate sentences filed before the district court.

"An evidentiary hearing on a postconviction motion is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement

of the movant's rights under the Nebraska or federal Constitution." *Sanders*, 241 Neb. at 689, 490 N.W.2d at 214. See, also, *State v. Schneckloth*, 235 Neb. 853, 458 N.W.2d 185 (1990); *State v. Start*, 229 Neb. 575, 427 N.W.2d 800 (1988); *State v. Jackson*, 226 Neb. 857, 415 N.W.2d 465 (1987); *State v. Malek*, 219 Neb. 680, 365 N.W.2d 475 (1985).

Conversely, an evidentiary hearing on a motion for postconviction relief may properly be denied when the records and files of the case affirmatively establish that the defendant is not entitled to relief. *State v. Maeder*, 240 Neb. 955, 486 N.W.2d 193 (1992); *State v. Keithley*, 238 Neb. 966, 473 N.W.2d 129 (1991).

The bulk of assigned errors raised in defendant's motion for relief before the district court were previously raised on direct appeal and finally determined by this court in *Victor I*. The record discloses that trial and appellate counsel did raise and argue the legality of Victor's confession, the constitutionality of § 29-2523(1)(d), the receipt into evidence of the 1964 manslaughter confession at the sentencing hearing, the determination that the aggravating circumstance found in § 29-2523(1)(d) existed and the mitigating circumstance found in § 29-2523(2)(g) did not exist, and the contention that the sentences were disproportionate and excessive.

We have repeatedly held that a motion for postconviction relief cannot be used as a substitute for an appeal or to secure a further review of issues already litigated on direct appeal. It is not the purpose of affording postconviction relief to permit the defendant endless appeals on matters already decided. See, *State v. Whitmore*, 238 Neb.

125, 469 N.W.2d 527 (1991); *State v. El-Tabech*, 234 Neb. 831, 453 N.W.2d 91 (1990). Defendant's only attempt to avoid the procedural bar of the previously raised issues is by asserting that he was denied effective assistance of counsel because trial and appellate counsel *improperly* raised these issues. However, defendant failed to advance, either in the motion before the district court or in the present appeal to this court, allegations of specific facts to support these bare conclusions. Since defendant failed to make a factual showing to indicate he was entitled to relief, the district court did not err in denying defendant an evidentiary hearing on these previously litigated issues.

Relying on the U.S. Supreme Court's decision in *Cage v. Louisiana*, ___ U.S. ___, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), defendant further argues that the jury instruction on reasonable doubt was unconstitutional in that it confused the jury and suggested a higher degree of doubt than is required under the 14th Amendment. Subsequent to defendant's trial and appeal, this court has had the opportunity to review the constitutionality of a jury instruction identical to the one challenged here. See *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991). In *Morley*, we upheld the constitutionality of the reasonable doubt language of the Nebraska jury instruction, finding the language distinguishable from that found unconstitutional by the U.S. Supreme Court in *Cage*. Therefore, whether or not trial and appellate counsel failed to object to or appeal the jury instruction and whether or not the district court should have provided Victor the opportunity to advance this claim in an evidentiary hearing are

now irrelevant, causing this assignment of error also to be without merit.

The majority of Victor's claims were raised and fully reviewable from the record on direct appeal. Defendant's contentions that counsel failed to disclose a conflict of interest and failed to submit evidence in support of the pretrial motion for change of venue were not raised before the district court and are accordingly irrelevant to the court's decision to deny an evidentiary hearing. Victor's assigned error addressing the reasonable doubt instruction was decided by our opinion in *State v. Morley, supra,* and is consequently without merit. Finding that Victor has failed to allege facts that would constitute a denial or violation of his constitutional rights causing the judgments and convictions against him to be void or voidable, we hold that the district court did not err in denying an evidentiary hearing on his postconviction motion.

In his motion for relief to the district court, defendant alleged that the Nebraska Supreme Court committed error on his direct appeal. Victor first argued that the reweighing process for aggravating and mitigating circumstances engaged in by the Nebraska Supreme Court was unconstitutional. Victor also argued that the Nebraska Supreme Court erroneously refused to consider his inability to conform his conduct to law because of mental defect or intoxication. Defendant does not now further argue or advance these previously assigned errors except, perhaps, as they arise under the alleged errors of the district court in denying an evidentiary hearing and court-appointed counsel. In the absence of a factual allegation, an initial demonstration of an extraordinary and

relevant novel argument, or a reference to binding precedent not appearing in the record on direct appeal, errors of a state appellate court that are assigned for review before a state trial court in a motion for postconviction relief are without merit. Consequently, it was proper for the district court to address these errors without providing an evidentiary hearing and without appointing counsel.

> When the defendant in a postconviction proceeding alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area.
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> *State v. Carter,* 241 Neb. 645, 650, 489 N.W.2d 846, 852 (1992). A defendant who asserts a claim of ineffective assistance of counsel and who seeks reversal of his convictions " ' "must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different." . . . ' " *State v. Lyman,* 241 Neb. 911, 915, 492 N.W.2d 16, 19 (1992).

Defendant asserts that previous counsel failed to disclose a conflict of interest in the representation of defendant at both the trial and appellate level and in allegedly assisting defendant in drafting the petition for postconviction relief. Defendant also claims that trial counsel

failed to submit evidence in support of the pretrial motion for change of venue.

These issues were not raised in the motion for postconviction relief filed with the district court, nor were they specifically assigned as error in defendant's brief. "Absent plain error, where an issue is raised for the first time in this court, it will be disregarded inasmuch as the court whose judgment is being reviewed cannot commit error regarding an issue never presented and submitted for disposition." *State v. Whitmore,* 238 Neb. 125, 132, 469 N.W.2d 527, 532 (1991). Additionally, when a claim of ineffective assistance of counsel has not been raised or ruled on by the trial court *and* necessitates an evidentiary hearing, the matter will not be addressed on appeal. *State v. Morley,* 239 Neb. 141, 474 N.W.2d 660 (1991).

Considering that the allegation of an undisclosed conflict of interest was not raised or ruled on by the trial court and recognizing that there is not a record to review, we will not address the matter. Nor are we able to review the claim that trial counsel failed to submit evidence in support of the pretrial motion for change of venue. The only reviewable record about trial counsel's efforts to seek a change of venue is an inexplicit three-line notation on the criminal docket sheet. This notation merely references that a hearing was held on defendant's motion for a change of venue and that the motion was overruled after "evidence" was presented. Therefore, the ineffective assistance of counsel claim based on these two newly alleged grounds is not properly before this court.

As previously determined in the evidentiary hearing analysis, the failure of counsel to object to or appeal the

reasonable doubt jury instruction is now moot in light of our decision in *State v. Morley, supra.* The claims advanced by defendant regarding whether trial and appellate counsel failed to raise, or improperly raised, issues numbered (2), (3), (4), (5), (6), and (7) in the motion filed by defendant before the district court are also without merit. Defendant failed to advance, either in the motion before the district court or in the present appeal to this court, allegations of specific facts to support a conclusion that appellate counsel improperly raised the six constitutional issues challenged here. Defendant has failed to demonstrate how counsel's performance in raising the constitutional issues on direct appeal was deficient, and defendant has not attempted to advance a theory to show how this unknown deficiency prejudiced the defense.

In sum, defendant's assertion that he was denied effective assistance of counsel for various failures by trial and appellate counsel is without merit based on the record before us.

Victor alleges that in light of his undisputed indigency, the district court erred in failing to provide him court-appointed counsel. Under § 29-3004 (Cum. Supp. 1992), a district court may appoint an attorney to represent a prisoner in all postconviction proceedings under §§ 29-3001 through 29-3004. This power is within the discretion of the district court, and failure to appoint counsel in postconviction proceedings is not error in the absence of an abuse of discretion. *State v. Wiley,* 228 Neb. 608, 423 N.W.2d 477 (1988).

Neither the Eighth Amendment nor the Due Process Clause of the federal Constitution requires states to

appoint counsel for indigent death row inmates seeking state postconviction relief. See *State v. Otey*, 236 Neb. 915, 464 N.W.2d 352 (1991) (citing *Murray v. Giarratano*, 492 U.S. 1, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989)), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2279, 115 L. Ed. 2d 965. See, also, *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987).

Victor contends, however, that since he was represented at both the initial trial and direct appeal by the same attorney, his motion for postconviction relief was his " 'first appeal as of right' " to raise an ineffective assistance of counsel claim. Brief for appellant at 23. Defendant relies on a criminal defendant's constitutional right to appointed counsel established by the U.S. Supreme Court in *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963). In *Douglas*, the U.S. Supreme Court stated that "where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." (Emphasis omitted.) 372 U.S. at 357. By postulating that the postconviction proceeding provided him was his one and only appeal as of right to allege ineffective assistance of counsel, Victor maintains that it was error for the district court to deny him appointed counsel to assist him in advancing these claims.

Defendant further relies on the U.S. Supreme Court's decision in *Coleman v. Thompson*, ___ U.S. ___, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991), *reh'g denied* ___ U.S. ___, 112 S. Ct. 27, 115 L. Ed. 2d 1109, to argue that the district court was constitutionally required to provide him with

appointed counsel for his postconviction motion. In *Coleman*, the issue pertinent to this review was whether ineffectiveness of counsel on appeal from the state habeas trial court judgment was an independent constitutional violation to constitute cause for federal habeas relief. Noting that the prisoner could only prevail if he were constitutionally entitled to appointed counsel in state postconviction proceedings, the U.S. Supreme Court reiterated the general rule that there is no right to counsel in state collateral proceedings. The Court queried whether there should be an exception to this general rule for those cases where state collateral review is the first place a prisoner can present a challenge to his conviction. The Court declined to answer the question, however, in light of the fact that effectiveness of counsel before the state habeas *trial* court was not at issue. Any language in the *Coleman* opinion suggesting that a state trial court collateral proceeding may be considered a prisoner's "one and only appeal" was merely a passing inquiry and provides little insight or authority to defendant's argument here. 111 S. Ct. at 2568.

The U.S. Supreme Court has consistently recognized that the states have no obligation to provide postconviction relief proceedings and that when states do so provide, due process does not require that the states supply lawyers as well. See *Pennsylvania v. Finley, supra.*

Under Nebraska case law, where the record shows that a justiciable issue of law or fact is presented to the court in a postconviction action, an indigent defendant is entitled to the appointment of counsel. *State v. Wiley*,

supra. Here, however, the assigned errors in the postconviction petition before the district court were either procedurally barred or without merit, establishing that this postconviction action contains no justiciable issue of law or fact. We therefore find that it was not an abuse of discretion for the district court to deny court-appointed counsel.

Finding no merit in the assignments of error properly before this court, we affirm the decision of the district court in its entirety.

AFFIRMED.

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
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March 10, 1993

J. Joseph McQuillan
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IN CASE OF: S-91-0933, State v. Clarence Victor

Appellant/Motion for Rehearing & Brf **filed** 02/08/93 **has been reviewed by the court and the following order entered:** Motion of appellant for rehearing overruled.

Respectfully,

CLERK OF THE SUPREME COURT

APPENDIX "B"

SUPREME COURT OF THE UNITED STATES

No. 92-8894

Clarence Victor,

Petitioner

v.

Nebraska

ORDER ALLOWING CERTIORARI.

Filed September 28, 1993.

The petition herein for a writ of certiorari to the Supreme Court of Nebraska is granted limited to Question 3 presented by the petition. The case is consolidated with No. 92-9049, *Sandoval v. California*, and a total of ninety minutes is allotted for oral argument. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 9, 1993. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 7, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 21, 1993. Rule 29 does not apply.

September 28, 1993